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14 UNITED STATES DISTRICT COURT
15 DISTRICT OF ARIZONA

16 SolarCity Corporation,

17 Plaintiff,

18 vs.

19 Salt River Project Agricultural Improvement
20 and Power District,

21 Defendant.

Case No. 2:15-CV-00374-DLR

22 **DEFENDANT SALT RIVER
23 PROJECT AGRICULTURAL
24 IMPROVEMENT AND POWER
25 DISTRICT'S SEPARATE
26 STATEMENT OF FACTS IN
27 SUPPORT OF ITS MOTION FOR
28 SUMMARY JUDGMENT**

REDACTED VERSION

1
2 **BACKGROUND**

3 1. The District is a political subdivision of the State, vested by the Arizona
4 Constitution with all “immunities and exemptions granted municipalities and political
5 subdivisions under th[e Arizona] constitution or any law of the state or of the United
6 States.” Dkt. 77 at 9, 23 (citing A.R.S. §48-2302; Ariz. Const. art. 13, §7).

7 2. The District’s statutory purpose is to provide low-cost water and power within
8 its defined service area. A.R.S. § 48-2303.

9 3. The District is a governed by a fourteen-member Board of Directors (“the
10 Board”), a President and Vice-President, and a 30-member Council, elected pursuant to
11 Arizona law. A.R.S. § 48-2381 *et seq.* Four “at-large” Board members are elected by
12 landowners in the District, with each landowner entitled to receive one vote; all other
13 members are elected under an acreage-based voting system by landowners within each of
14 the District’s ten divisions. A.R.S. § 48-2363; District 2018 Election Fact Sheet,
15 http://www.srpnet.com/elections/pdfx/2018_FactSheet_District.pdf. These officials are
16 public officials under Arizona law. A.R.S. § 41-1231(19).

17 4. A majority of the District’s Board lack any business interest in irrigation from
18 the District. *See* Declaration of Christopher E. Babbitt Exs. 1, 2, 3, 4; 5 at 22:12-14; 6 at
19 8:23-9:7; 7; 8; 83.¹ One of the four board members with such an interest, Steve Williams,
20 voted against E-27. *Id.*, Ex. 9 at -302.

21 5. The District is a “public power entity.” A.R.S. § 30-801(16).

22 6. The District is a community-based nonprofit utility without about 1 million
23 customers. Ex. 10 at -313, -333.

24 7. The District has an obligation to furnish electricity to all residential customers
25 in its service area. Ex. 11 at -122 to -125; Ex. 12 at 61:15-20, 122:22-123:4. This
26
27

28 ¹ Each exhibit attached to the Declaration of Christopher E. Babbitt hereinafter cited in this
filing will be references as “Ex.”

1 obligation requires the District to meet the total electricity demands of all its customers at
2 any given moment in time. Ex. 13 at 157:7-19.

3 8. To satisfy the District's obligations, the District must invest in the electric
4 grid itself—the generation facilities, transmission and distribution lines, substations,
5 transformers, and other infrastructure necessary to ensure the District can reliably meet the
6 electricity needs of all customers within its territory. Ex. 14 at -726.

7 9. Seventy-three percent of the District's costs are fixed costs associated with
8 building and maintaining the grid. *Id.*

9 10. The District seeks to recover both its fixed and variable costs through its retail
10 electricity rates. Ex. 14 at -701, -710, -726 to -727; Ex. 15 at slide 14.

11 **SOLAR ELECTRICITY WITHIN THE DISTRICT**

12 11. Since 2004, roughly 15,000 District customers have installed rooftop solar
13 systems on their homes. Ex. 16 at -635; Ex. 17; Ex. 18.

14 12. Rooftop solar customers rely on the grid during periods of peak demand—
15 including in the late afternoon and evening after solar production has declined substantially.
16 Ex. 19 at 14; First Am. Cmplt. (Dkt. 39) ¶ 63. Thus, rooftop solar customers continue to
17 impose significant costs on the District. Ex. 20 at -951 to 952; Ex. 14 at -726; Ex. 15 at
18 slides 12-17; Ex. 21 at -506 to -507.

19 13. Rooftop solar is an intermittent resource, meaning that it does not provide
20 reliable electricity 24 hours a day. Rooftop solar does not generate significant electricity
21 when clouds are overhead, and it does not generate any electricity at night. Ex. 22. at
22 160:19-161:3; Ex.13 at 179:17-24, 181:14-19; Ex. 23 at 267:13-21.

23 14. Rooftop solar customers also rely on the District's grid to export any excess
24 electricity generated by the rooftop solar system. Ex. 13 at 176:21-25.

25 15. In 2005, the District adopted a "retail net metering" program, set forth in its
26 Residential Solar Buyback Service Rider, "to subsidize the economics of [rooftop solar]
27 technology." Ex. 24 at -607, -611.
28

1 16. Under retail net metering, the District credited rooftop solar customers the full
2 retail price of excess electricity they generated rather than the wholesale price the District
3 paid for electricity from other sources. Ex. 25 at-574.

4 17. Under retail net metering, the District effectively paid twice as much for
5 rooftop solar electricity as it would for electricity on the market. Ex. 14 at -741 to -760; Ex.
6 25, Ex. 27.

7 18. The District also provided a direct financial incentive for new rooftop solar
8 customers. That incentive was discontinued in 2014. Ex. 26 at -243.

9 19. Although the District initially offered these incentives, it made clear its
10 policies toward rooftop solar would eventually need to change. In a public, comprehensive
11 evaluation of its solar incentives conducted in 2006, the District observed that: “[C]rediting
12 the full kWh price of electricity to all on-site, customer-owned generation facilities ... would
13 create an unfair subsidy at the expense of other ratepayers by shifting the cost burden of all
14 or part of the fixed transmission, distribution, and customer service costs—services which
15 the utility must continue to make available to serve customers with on-site generation.” Ex.
16 24 at -607.

17 20. The District publicly explained nearly a decade ago that “[c]hanges to SRP’s
18 Net Metering offerings may occur ... in future price processes at the Board’s discretion.”
19 Ex. 24 at -623. Moreover, the District’s Rules and Regulations state that “SRP may change
20 these Rules and Regulations, any Standard Electric Price Plan, any of its Terms and
21 Conditions of Competition, or any other price, fee, charge, minimum, demand charge, rate,
22 credit, or other pricing term at any time.” SRP Rules and Regulations § 2.2.1,
23 <http://www.srpnet.com/about/pdfx/rulesandregs10042010.pdf>.

24 21. Under traditional residential rate plans, the size of a customer’s bill is
25 primarily determined by the volume of electricity the customer consumes in a given month.
26 Under these plans, the District recovers its costs through a small fixed monthly service
27 charge and a per kilowatt-hour (kWh) charge that can vary by the time of day and season of
28 the year. Ex. 14 at -745, -750, -755. Although most of the District’s costs are not driven by

1 the volume of electricity consumed, Ex. 14 at -726; Ex. 27 at - 485; Ex. 15 at slide 13, the
2 District's traditional rates adequately recover the District's costs from non-solar customers
3 because on average non-solar customers' usage corresponds with their on-peak demands.
4 Ex. 28 at 111:11-22, 112:6-8, 195:2-5, 216:12-13; Ex. 20 at -949, -951-952; Ex. 15 at slide
5 14.

6 22. As rooftop solar customers increased in number, the District's concern over
7 the subsidy of rooftop solar customers increased. Ex. 29 at 9; Ex. 30; Ex. 31 at 205:10-25.
8 This concern stemmed from the District's determination—one with which SolarCity's
9 economic expert, Dr. Kalt, agrees—that rooftop solar customers were not covering their
10 cost of service. Ex. 13 at 154:3-12; Ex. 32 at Figures 10A-C, 33A-C (compare revenues to
11 costs); Ex. 27; Ex. 14 at -710, -766; Ex. 33; Ex. 26 at -238; Ex. 15 at slide 17; Ex. 34 at
12 11:9-12:13, 204:11-20; Ex. 35 at 17:8-15; Ex. 31 at 134:8-14, 205:10-25.

13 23. This shortfall existed because rooftop solar customers' usage fell by a greater
14 percentage than did their demand. Ex. 36 at -173; Ex. 15 at slide 16. "Usage" measures the
15 total amount of electricity consumed by a customer and is measured in kWhs. "Demand"
16 measures a customer's highest amount of electricity consumed during a given period of time
17 and is measured in kW. See Ex. 15 at 13 (explaining and providing example of demand).
18 Prior to 2015, the District's residential price plans recovered demand-related costs primarily
19 through usage charges. Ex. 20 at -949, -951-952; Ex. 14 at -710, -766; Ex. 15 at slide 14.

20 24. The District had long recognized that its traditional volumetric rates reflected
21 "imperfect pricing," as applied to rooftop solar customers, and observed that it would
22 eventually "need to adjust its retail tariffs" to ensure adequate recovery of its fixed costs.
23 Ex. 24 at -617, -619.

24 25. In 2014, the District estimated that it was facing a negative [REDACTED]
25 for its solar customers, resulting in [REDACTED] during the 2015 fiscal year
26 alone. Ex. 33. The District estimated a shortfall of \$51/month for the typical solar
27 customer. Ex. 26 at -238.

1 26. Meanwhile, cheaper sources of solar generation became available. In
2 November 2014, the District entered into a 21-year agreement to buy the entire output of the
3 Sandstone utility scale solar facility outside of Florence for 5.3 cents per kWh—
4 approximately half the price at which the District was then crediting rooftop solar customers
5 under retail net metering. Ex. 14 at -710.

6 **THE DISTRICT'S 2014-2015 PRICING PROCESS**

7 27. The District conducted its most recent pricing process in 2014-2015 in
8 conformance with A.R.S. §§ 30-802 and 48-2334. Ex. 37; Ex. 15 at 2.

9 28. On November 29, 2014, the District advised its residential customers that the
10 District was commencing a ratemaking process, covering all rate schedules, to begin on
11 December 12, 2014. Ex. 38.

12 29. On December 1, 2014, SolarCity and other stakeholders were given notice by
13 email of the District's upcoming ratemaking proceeding and were offered an opportunity to
14 participate. *See* Ex. 39.

15 30. The District created a website for the public pricing process, and set up an
16 email address for stakeholders and members of the public to submit questions, comments, or
17 information requests. Ex. 37. The District also set up a public information room containing
18 documents relating to the pricing process. *Id.*

19 31. On December 12, 2014, the District issued a notice of the public comment
20 sessions, board meetings, and vote on the proposed rate schedules. The notice explained
21 that there would be a Special Board Meeting on February 9, 2015, and identified three
22 additional meetings where interested parties could make presentations and comments. *Id.*

23 32. On December 31, 2014, SolarCity provided written notice to the District,
24 invoking its statutory rights under A.R.S. §§ 30-802 and 48-2334. Ex. 40.

25 **THE E-27 RATE SCHEDULE**

26 33. Among the proposed rate schedules was a new plan for customers who chose
27 to install solar panels after December 8, 2014. Ex. 14 at -766 to -767.
28

1 34. This new rate plan, called E-27, contains three parts (rather than the traditional
2 two), unbundling the traditional volumetric charge into separate charges for energy usage
3 and demand. Ex. 14 at -727 to -728.

4 35. The District anticipated that under E-27 a typical solar customer would save
5 about \$50/month on his or her bill from the District compared to a non-solar customer, even
6 without a change in behavior, with the potential to save more by changing his or her on-
7 peak demand. Ex. 19 at 15, 16. The District's analysis also showed that some customers
8 would have lower bills under E-27 than they would under the E-26 rate plan, assuming no
9 change in behavior. Ex. 41.

10 **THE BOARD'S DELIBERATIONS AND APPROVAL OF E-27**

11 36. The Board was informed by members of the District's management, industry
12 consultants, including Ashley Brown, Executive Director of the Harvard Electricity Policy
13 Group; Amparo Nieto, Vice President at NERA Economic Consulting; and Ahmad Faruqui,
14 a principal at the Brattle Group, and the Board's separately retained independent consultant,
15 Dr. John Chamberlin of Sussex Economic Advisors, that the prior rate structures
16 undercharged rooftop solar customers, creating a cross subsidy; that creating a separate
17 customer class for rooftop solar customers is consistent with sound ratemaking practices,
18 and that the new E-27 rate design appropriately addressed the under-recovery of costs from
19 rooftop solar customers. Ex. 42; Ex. 43; Ex. 44; Ex. 21 at -768 to -815; Ex. 45 at -144 to -
20 156; Ex. 46 at -799 to -813; Ex. 47 at -062 to -067; Ex. 21 at -519 to -527, -821 to -827; Ex.
21 45 at -119 to -135; Ex. 48 at -309 to -325; Ex. 46 at -681 to -684, -813 to -816; Ex. 26; Ex.
22 49; Ex. 36; Ex. 50; <http://www.srpnet.com/prices/priceprocess/pricingfaq.aspx>.

23 37. Counsel and executives for SolarCity and its lobbying group presented
24 SolarCity's opposition to E-27 at two public hearings, Ex. 51, and attended others. *See* Ex.
25 52 at -441; Ex. 53 at -565; Ex. 21 at -484; Ex. 46 at -658.

26 38. SolarCity made oral presentations, questioned the District's employees and
27 consultants during interviews conducted by its counsel during the pricing process, and met
28

1 with Board members. Ex. 54 at 64:3-68:1; *see also* Ex. 53; Ex. 21 at -619 to -635; Ex. 46 at
2 -710 to -714.

3 39. SolarCity did not propose an alternative rate design to E-27 to the Board
4 during the pricing process. Ex. 54 at 128:8-128:21.

5 40. SolarCity did not petition for a rehearing of the Board's decision on E-27, *see*
6 Ex. 54 at 73:9-21, Ex. 46, and 20 days have elapsed since the ratemaking process
7 concluded, *see id.*

8 41. Exercising its statutory authority, the District's Board modified management's
9 proposed version of E-27, including modifications SolarCity requested. Ex. 50 at -397, -
10 399; Ex. 46 at -870 to -871; Ex. 54 at 85:19-86:10. *See* Ex. 9 at -297 to -302.

11 42. Among other changes, the Board allowed existing rooftop solar customers to
12 remain on their existing rate plans for a period of 20 years instead of the 10 years
13 management had proposed. Ex. 9 at -303 to -308. SolarCity's CEO testified that this "was
14 an important change." Ex. 22 at 33:11-17.

15 **SOLARCITY'S WITHDRAWAL**
16 **FROM THE DISTRICT'S SERVICE TERRITORY**

17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

1 47. SolarCity's CEO told the Arizona Republic after it pulled out of the District's
2 service territory: "Strange enough, it actually ends up better for SolarCity Financially,
3 it's not a bad thing for the company." Exs. 61; 22 at 88:16-89:8, 92:15-17.

4 **THE DISTRICT HAD NO PRIOR COURSE**
5 **OF DEALING WITH ROOFTOP SOLAR INSTALLERS**

6 48. The District has never had any course of dealing, agreement, or understanding
7 with any rooftop solar installer concerning rate structures, incentives, or any other terms or
8 conditions of the District's sale of electricity to residential rooftop solar customers or any
9 other customers. Dkt. 39 at ¶ 92 ("SolarCity does not contract directly with SRP to provide
10 systems to consumers."); Dkt. 97 at 10 n.4 ("There is no prior course of dealing 'with
11 SolarCity' as relevant here."). The District's relationship has always been directly with its
12 residential customers. Ex. 14 at -766 to -767.

13 49. Moreover, because existing rooftop solar customers were grandfathered into
14 the prior rate plans, Ex. 9 at -303 to -308, the District did not alter any prior course of
15 dealing with those customers.

16 **THE DISTRICT'S RATE CHANGES DID NOT**
17 **SACRIFICE SHORT-TERM PROFITS, THEY INCREASED THEM**

18 50. The District anticipated that E-27 would increase the revenue received from a
19 typical solar customer by about \$50/month compared to the prior E-26 rate plan with "retail
20 net metering," assuming no change in behavior. Ex. 19 at 15.

21 51. The District estimated that E-27 would collect sufficient revenue from the
22 typical rooftop solar customer to cover their cost of service, including their fair share of grid
23 costs. Ex. 19 at 13-15; Ex. 14 at -766; Ex. 46 at -683; Ex. 21 at -508 to -509.

24 52. The District projected that the rate plans adopted in the 2014-2015 pricing
25 process would cumulatively generate \$109,806,698 in additional revenue, and increase the
26 District's combined net revenue. Ex. 14 at -721, -736.

27 53. SolarCity's retained expert economist, Dr. Kalt, testified that the District set
28 E-27's price above its marginal costs. Ex. 62 ¶ 93; Ex. 13 at 299:10-14.

1 54. Dr. Kalt performed no analysis of any alternative rate plan that would increase
2 the District’s revenues or profits more than E-27. Ex. 13 at 277:3-278:4.

3 **CUSTOMERS CONTINUE TO INSTALL ROOFTOP**
4 **SOLAR IN THE DISTRICT’S SERVICE TERRITORY**

5 55. Under E-27, the customers continue to install solar panels on their roofs and
6 the District continues to buy excess power generated from those panels. Ex. 14 at -766 to -
7 767.

8 56. In 2015, dozens of rooftop solar installers continued to operate in the
9 District’s service area. Ex. 63 at 224:19-22; Ex. 64.

10 57. [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 **SOLARCITY DOES NOT PROVIDE RETAIL ELECTRICITY**

16 58. The relevant market as SolarCity defines it is the provision of electricity to
17 retail residential, governmental, and businesses consumers. Dkt. 39 at 10.

18 59. SolarCity does not provide or furnish retail electricity in Arizona. Ex. 67 at
19 15:9-17; *see also* Ex. 22 at 148:13-16; Ex. 82.

20 60. To provide retail electricity in Arizona a company must “obtain a certificate”
21 from the Arizona Corporation Commission. A.R.S. §§ 30-803(A), 40-207(A). SolarCity
22 has not applied for or obtained such a certificate: “specific rules adopted by the Arizona
23 Corporation Commission—which regulates companies that produce and sell electricity
24 directly to consumers—expressly prohibit [SolarCity] from doing so.” *SolarCity v. Ariz.*
25 *Dep’t of Revenue*, Verified Complaint ¶ 5 (“*SolarCity Compl.*”), No. TX 2014-00129 (Ariz.
26 Super. Ct. June 30, 2014).

1 61. “Since 2006, various energy service, meter reading and meter service
2 providers ...have applied to the [ACC] for authorization to sell competitive services in
3 Arizona, but the ACC has not ruled on any of the applications.” Ex. 68.

4 62. The ACC acknowledges that “for all practical purposes, consumers do not yet
5 have a choice of [retail electric] providers.” ACC, Frequently Asked Questions,
6 <http://www.azcc.gov/divisions/utilities/electric/faqs.asp> (visited May 2, 2016).

7 **NO EVIDENCE SUPPORTS SOLARCITY’S TORT CLAIMS**

8 63. [REDACTED]
9 [REDACTED]

10 64. SolarCity objected to the District’s interrogatory seeking information
11 regarding the alleged damage caused by the alleged intentional interference, stating that the
12 subject was a topic for expert discovery, *see* Ex. 70, yet provided no such expert testimony.

13 65. [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED] [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED] [REDACTED]
21 [REDACTED]
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1 RESPECTFULLY SUBMITTED this 15th day of September, 2016.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on September 15, 2016, I electronically transmitted the attached
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